

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TECMARINE LINES, INC.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
CSX INTERMODAL, INC.,	:	
Defendant	:	NO. 01-CV-1658

Newcomer, S.J. August , 2001

M E M O R A N D U M

Presently before the Court is Defendant CSX Intermodal, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Alternatively to Set Aside Default, as well as Plaintiff Tecmarine Line, Inc.'s Responses thereto. For the reasons outlined below, the Court will grant defendant's Motion to Set Aside Default, set aside the default entered against defendant, and order further briefing from the plaintiff on the issue of subject matter jurisdiction.

I. MOTION TO SET ASIDE DEFAULT

On April 4, 2001, Tecmarine Line, Inc. ("Tecmarine"), a non-Pennsylvania cargo transport corporation, filed suit against CSX Intermodal, Inc. ("CSXI"), an out-of-state corporation that allegedly owns and operates an interchange yard in Philadelphia, Pennsylvania. The Complaint contains three counts, all relating to the alleged loss of ten chassis leased by Tecmarine and left on CSXI's property. Tecmarine alleges that CSXI: (1) lost, stole or misappropriated the ten chassis; (2) negligently managed and operated its facility, failed to properly train its employees,

and failed to properly care for the chassis; and (3) wrongfully detained and converted the chassis. Tecmarine then served Dennis Sweeney, CSXI's Philadelphia Terminal Manager, on April 10, 2001. On May 1, 2001, Tecmarine filed a Motion to Enter Default, which was granted the same day, because CSXI failed to submit an answer within the twenty days required by Federal Rule of Civil Procedure 12. Thereafter, CSXI's counsel entered his appearance in this Court on May 3, 2001. The Court received the instant Motion to Set Aside Default on June 12, 2001.

A. DISCUSSION

Rule 55(c) permits the Court to set aside an entry of default if good cause is shown. See Fed.R.Civ.P. 55(c). To determine whether to set aside an entry of default the Court must consider and make specific findings as to four factors: (1) whether the defendant has a meritorious defense; (2) whether the plaintiff would be prejudiced by vacating the default; (3) whether the default resulted from the defendant's culpable conduct; and (4) whether alternative sanctions would be effective. See Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987)(explaining standard for vacating default judgment); Feliciano v. Reliant Tooling Co. Ltd., 691 F.2d 653, 656 (3d Cir. 1982)(noting that the same factors apply when vacating an entry of default as when vacating default judgment). As in the case of default judgment, "[d]efault is not favored and

all doubt should be resolved in favor of setting aside default and reaching a decision on the merits." 99 Cents Stores v. Dynamic Distrib., Civ.A. No. 97-3869, 1998 WL 24338 (E.D. Pa. Jan. 22, 1998). In fact, less substantial grounds are adequate for setting aside a default than would be required for opening a judgment. See Feliciano, 691 F.2d at 656.

1. MERITORIOUS DEFENSE

Showing a meritorious defense requires the defendant to submit allegations that would provide a complete defense to the plaintiff's underlying claim if proved at trial. See United States v. A Single Story Double Wide Trailer, 727 F.Supp. 149, 151-52 (D.Del. 1989). The defendant need not establish the merit of its defense; rather, he must only offer a defense which, if successful at trial, would completely bar the action. See International Brotherhood of Electrical Workers, Local Union 313 v. Skaggs, 130 F.R.D. 526, 529 (D.Del. 1990). However, a general denial is insufficient to overturn a default; rather, the defendant must assert specific facts supporting the existence of a prima facie meritorious defense. See Cassell v. Philadelphia Maintenance Company, Inc., 198 F.R.D. 67, 69 (E.D.Pa. 2000)(citing \$55,518.05 in United States Currency, 728 F.2d at 194-96).

Here, CSXI presents a meritorious defense in its Motion to Set Aside Default and in its proposed Answer. CSXI states

that it was not responsible for the chassis left on its property, because it did not permit storage of any chassis for more than 24-hours. Thus, CSXI alleges that if Tecmarine left its chassis on CSXI's property, it was done at Tecmarine's own risk. Moreover, CSXI asserts that Tecmarine now possesses five of the alleged missing chassis, that it has advised Tecmarine of the location of two more chassis, and that it has no record of receiving one chassis. CSXI reiterates that the two chassis not yet located were left on its property at Tecmarine's own risk. Thus, as to the negligence claim, if the chassis were left on CSXI's property at Tecmarine's own risk, then CSXI did not have a duty to protect the chassis, and Tecmarine's negligence claim would be barred.

Moreover, Tecmarine asserts that CSXI invalidates its defense to conversion by admitting that it possessed the chassis at one time. This assertion fails, however, because Pennsylvania does not equate possession with conversion.

Tecmarine fails to aver the other elements of conversion. The accepted definition of conversion under Pennsylvania law is "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification."

L.B. Foster Co. V. Charles Caracciolo Steel and Metal Yard, Inc., 2001 WL 515071 at *5 (Pa. Super. April 30, 2001) (citing McKeeman

v. Corestates Bank, N.A., 751 A.2d 655, 659 n. 3 (Pa.Super. 2000)). Therefore, if, as CSXI asserts, Tecmarine left the chassis on CSXI's property for more than 24 hours without CSXI's consent, and at Tecmarine's own risk, then CSXI offers a defense, which, if established at trial, bars Tecmarine's action. The Court therefore concludes that the first factor in demonstrating good cause to set aside default rests in favor of CSXI.

2. PREJUDICE TO PLAINTIFF

Prejudice to the plaintiff occurs when relief would hinder the plaintiff's ability to pursue its claims through loss of evidence, increased potential for fraud, or substantial reliance on the default. See Feliciano, 691 F.2d at 657. Delay in realizing satisfaction on a claim rarely constitutes prejudice sufficient to prevent relief. See Feliciano, 691 F.2d at 656-57. Nor does the fact that the plaintiff will be required to further litigate the action on the merits constitute prejudice. See Choice Hotels Int'l, Inc. v. Pennave Assoc., Inc., CIV.A. No. 98-4111, 192 F.R.D. 171, 2000 WL 133954, at *3 (E.D.Pa. Feb. 4. 2000).

In the instant case, Tecmarine fails to demonstrate that any legitimate prejudice would occur if the Court were to set aside the default against CSXI. Tecmarine's contention that "having to participate in discovery and a trial of this matter will prejudice [it]" betrays a fundamental

misunderstanding of what it means to be a plaintiff. Moreover, the Court finds nothing to indicate that the six weeks between the entry of default and the filing of the instant motion prejudiced Tecmarine. Accordingly, the second factor also favors setting aside the default entered against CSXI.

3. CULPABLE CONDUCT

The third factor the Court must consider in setting aside default is the defendant's culpability, that is whether the defendant showed excusable neglect. See Adena Corporation v. D'Andrea, CIV.A. No. 91-1202, 1997 WL 805265, at *2 (E.D.Pa. Dec. 30, 1997). A defendant exhibits culpable conduct if he fails to respond to the complaint willfully, in bad faith, or as part of trial strategy. See Skaggs, 130 F.R.D. at 529. The Third Circuit has used the following factors to determine a defendant's culpability: (1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure; (2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court; (3) counsel's failure to provide for a readily foreseeable consequence; (4) a complete lack of diligence; or (5) whether the inadvertence resulted despite counsel's substantial good efforts towards compliance. See Adena, 1997 WL 805265, at *3 (citing Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 517 (3d Cir. 1988)).

CSXI's dilatory Answer to Tecmarine's Complaint, while

negligent, does not appear to result from bad faith. Conceding that service was received by CSXI's Philadelphia Terminal Manager on April 10, 2001, CSXI has produced affidavits showing that, due to its own negligence, it believed that Tecmarine served the complaint on April 17, 2001, making its answer due on May 7, 2001. CSXI's Philadelphia counsel received the Complaint on May 1, 2001. On May 3, 2001 when CSXI's counsel contacted Tecmarine's counsel to request an extension of time to file an answer, he was informed that this Court had already entered default on May 1, 2001. Later that day, CSXI's counsel entered his appearance in this Court, and subsequently requested that Tecmarine's counsel stipulate that the default be removed.

This Court finds it outrageous that CSXI would contend that waiting six weeks until June 12, 2001 to file its Motion to Set Aside Default, after believing an Answer was due May 7, 2001, qualifies as "prompt." However, the Court does not find CSXI's behavior was beyond the bounds of excusable neglect. Moreover, CSXI appears to have been diligent in its efforts to save both parties the costs of filing the instant motion and response. Thus, the third factor also weighs in favor of CSXI.

4. ALTERNATIVE SANCTIONS

"It is well established that district courts have discretionary authority to determine the appropriate sanction for a particular case and to impose severe sanctions in cases it

seems appropriate." Coastal Mart, Inc. v. Johnson Auto Repair, Inc., 196 F.R.D. 30, 34 (E.D.Pa. 2000)(citing National Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639 (1976)).

However, a default and subsequent default judgment should be a sanction of last, not first, resort, and courts should try to find some alternative. See Emcasco Ins. Co, 834 F.2d at 75.

"Courts issue alternative sanctions in cases where they are troubled by the behavior of the party seeking to set aside the default." See Royal Ins. Co. of America v. Packaging Coord., Inc., 2000 WL 1586081, at *3 (E.D.Pa Oct. 24, 2000)(citing American Telecom, Inc. v. First Nat'l Comm. Network, Inc., CIV.A. No. 99-3795, 2000 WL 714685, at *8 (E.D.Pa. June 2, 2000)). In addition, when determining the appropriate sanction to impose, "district courts are advised to seek the most direct route that is preferable and to avoid compelling an innocent party to bear the brunt of its counsel's dereliction." Coastal Mart, 196 F.R.D. at 34 (citing Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 869 (3d Cir. 1984)).

This Court does not condone CSXI's overdue filings, and is perplexed as to CSXI's reason for filing its Motion to Set Aside Default and proposed Answer on June 12, 2001 if it believed its Answer was due on May 7, 2001. However, courts generally refrain from imposing alternative sanctions when there is no evidence of bad faith or willfulness, or when default

was entered due to a procedural error rather than a penalty. See Royal Ins. Co. of America, 2000 WL 1586081 at *3; Emcasco Ins. Co., 834 F.2d at 75; Dixon v. Philadelphia Housing Authority, 185 F.R.D. 207, 209 (E.D.Pa. 1999). Accordingly, because there is no evidence that CSXI acted egregiously, this Court finds alternative sanctions unnecessary.

CSXI's Motion and Proposed Answer show that its defense is meritorious and that its behavior is not culpable. Moreover, Tecmarine does not demonstrate that any legitimate prejudice will result from setting aside the default. Thus, in light of the above considerations and this Court's desire to have this matter resolved on the merits, the Court will grant CSXI's Motion to Set Aside Default.

II. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Now, the Court must consider CSXI's Motion to Dismiss for Lack of Subject Matter Jurisdiction, and Tecmarine's Response thereto.

CSXI contends that this Court lacks subject matter jurisdiction over the instant case because Tecmarine asserts only the state law claims of negligence and conversion without alleging jurisdiction based on diversity under 28 U.S.C. § 1332. CSXI also avers that Tecmarine's statement of jurisdiction is deficient because, while Tecmarine claims jurisdiction is proper based on 28 U.S.C. § 1337, it fails to enumerate the "Act of

Congress" under which its claims fall, as required by that statute.

Tecmarine's Complaint states that federal jurisdiction is proper under 28 U.S.C. § 1337 because its claims "originate from the interstate transportation of cargo by rail." Tecmarine responds to CSXI's Motion to Dismiss by asserting that 28 U.S.C. § 1337 confers jurisdiction to district courts over any civil action "arising under any action of Congress regulating commerce" (emphasis added). Tecmarine then contends that the instant claims fall under the "Interstate Commerce Act" because the chassis in dispute were "transported between terminal facilities and railroads." Thus, Tecmarine asserts that because subject matter jurisdiction was sufficiently pled in the Complaint, and as its claims fall under the "Interstate Commerce Act," federal jurisdiction is proper.

A. DISCUSSION

A district court may grant a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the legal insufficiency of the claim. Tolan v. United States, 176 F.R.D. 507, 509-10 (E.D.Pa. 1998) (citing In re Corestates Trust Fee Litigation, 837 F.Supp. 104, 105 (E.D.Pa. 1993), aff'd, 39 F.3d 61 (3d Cir. 1994)). "But dismissal is only proper when the claim 'appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial or

frivolous.'" Id. At 510 (quoting Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3d Cir. 1991)). The plaintiff bears the burden of persuasion when a 12(b)(1) subject matter jurisdiction challenge is raised. Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d.Cir. 1991) cert denied, 501 U.S. 1222 (1991).

The Court finds that Tecmarine's Response to CSXI's Motion to Dismiss is ambiguous; and the Court remains uncertain as to whether it has subject matter jurisdiction over Tecmarine's causes of action. Although Tecmarine contends that "jurisdiction is based on the Interstate Commerce Act and its progeny," it neither explains nor cites to the "Interstate Commerce Act." Consequently, this Court has no way of determining its applicability to Tecmarine's claims. Therefore, this Court will order Tecmarine to submit additional briefing that sets forth in detail and with precision how subject matter jurisdiction is conferred on the Court in this case.

Clarence C. Newcomer, S.J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

TECMARINE LINES, INC.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
CSX INTERMODAL, INC.,	:	
Defendant	:	NO. 01-CV-1658

O R D E R

AND NOW, this day of August, 2001, it is hereby
ORDERED as follows:

(1) Defendant's Motion to Set Aside Default (Paper #5)
is GRANTED.

(2) The default entered in this case against Defendant
CSXI on May 1, 2001 is hereby set aside.

(3) Plaintiff shall submit additional briefing that
sets forth in detail and with precision how subject matter
jurisdiction is conferred on the Court in this case. Said brief
shall not exceed 5 pages and shall be filed by August 17, 2001.

(4) Defendant shall be permitted to respond to
plaintiff's brief. Defendant's brief shall not exceed 5 pages
and shall be filed by August 24, 2001.

(5) Copies of all additional briefing shall be
furnished to the Court in the form of a courtesy copy.

AND IT IS SO ORDERED.

Clarence C. Newcomer, S.J.